

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Indian River Power Supply, LLC

Project No. 12462-009

ORDER DENYING INTERVENTION, DISMISSING REQUEST
FOR REHEARING, AND GRANTING REQUEST TO WITHDRAW PLEADING

(Issued October 23, 2006)

1. In this order, we deny a motion to intervene and dismiss a request filed by Alternative Light and Hydro Associates (Alternative L&H) for rehearing of a July 6, 2006 Commission staff letter order rejecting the application of Indian River Power Supply, LLC (Indian River) to amend the exemption for the Indian River Project No. 12462.¹ We also grant a request by Indian River to withdraw the amendment application.

Background

2. In 2003, Alternative L&H filed a preliminary permit application to study the feasibility of rehabilitating the existing Russell Falls Project No. 12430, to be located on the Westfield River in Massachusetts. Indian River, which owns the project site,

¹ Letter from Joseph D. Morgan, Director, Division of Hydropower Administration and Compliance, to Peter B. Clark, Manager, Indian River Hydroelectric Project.

subsequently filed a timely application for an exemption² to construct a 700-kilowatt (kW) capacity facility at the project site, using the existing turbines. On February 2, 2005, pursuant to our policy of favoring development applications over preliminary permit applications, we dismissed Alternative L&H's permit application, subject to reinstatement should Indian River's exemption application be dismissed or denied.³

3. On February 23, 2006, we issued an exemption to Indian River for Project No. 12462 and, because its application was granted, dismissed Alternative L&H's permit application with prejudice.⁴ On rehearing, Alternative L&H asserted, among other things, that Indian River had indicated in the course of the exemption proceeding that it in fact intended to construct a 1,620-kW project. According to Alternative L&H, this change in plans would have necessitated assigning a new filing date to Indian River's application, which in turn would have rendered that application too late to compete with Alternative L&H's permit application.⁵ On June 15, 2006, we denied Alternative L&H's request for rehearing.⁶ With regard to the referenced argument, we concluded that Indian River had not stated on the record that it intended to pursue the larger project, nor had it asked the Commission for authorization to construct it.⁷

² The Commission is authorized to exempt from the licensing requirements of Part I of the Federal Power Act small hydroelectric projects with an installed capacity of 5 megawatts or less that use for the generation of electricity either an existing dam or a natural water feature without the need for any dam or impoundment. *See* section 405 and 408 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2705 and 2708 (2000), as amended by section 246 of the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 679.

³ *Alternative Light and Hydro Associates*, 110 FERC ¶ 62,096 (2005), *reh'g denied*, 112 FERC ¶ 61,110 (2005). The Commission's policy in this regard was established in *Dennis V. McGrew*, 32 FERC ¶ 61,229 (1985).

⁴ *Indian River Power Supply, LLC, et al.*, 114 FERC ¶ 62,175 (2006).

⁵ *See id.* at P 7-9.

⁶ *Indian River Power Supply, LLC, et al.*, 115 FERC ¶ 61,321 (2006).

⁷ *Id.* at P 10.

4. Alternative L&H has filed an appeal of the exemption proceeding orders.⁸
5. On June 22, 2006, Indian River filed an application to amend the exemption by increasing the authorized capacity from 700 kW to 1,620 kW. On July 6, 2006, the amendment application was rejected by order of the Director of the Division of Hydropower Administration and Compliance, Office of Energy Projects (OEP), on the basis that the amendment application was inconsistent with filings made by Indian River in the exemption proceeding regarding its intentions with respect to the size of the project. Alternative L&H timely filed a request for rehearing and motion to intervene.
6. On August 4, 2006, Indian River filed a letter withdrawing its amendment application and stating its intention to construct the project as authorized.⁹ On August 8, 2006, Alternative L&H filed a protest to Indian River's withdrawal. Thus, under our regulations, Indian River's withdrawal will become effectively only if it is accepted by the Commission.¹⁰

Discussion

7. As an initial matter, we must act on Alternative L&H's motion to intervene. Since requests for rehearing may only be filed by parties to proceeding,¹¹ Alternative L&H may only seek rehearing if we grant the motion to intervene.
8. We allow intervention in post-licensing proceedings only where the filings at issue entail material changes in the plan of project development or in the terms and conditions of the license, could adversely affect the rights of property-holders in a manner not

⁸ *Alternative Light and Hydro Company v. FERC*, D.C. Cir. No. 06-1299 (appeal docketed August 14, 2006).

⁹ Letter from Peter B. Clark to Magalie Salas, Commission Secretary.

¹⁰ 18 C.F.R. § 385.216 (b)(1) and (2) (2006).

¹¹ See 16 U.S.C. § 825l(a) (2000) ("Any person, State, municipality, or State Commission aggrieved by an order issued by the Commission in a proceeding to which such person, State, municipality, or State Commission is a party may apply for rehearing within thirty days after the issuance of such order.")

contemplated by the license, or involve an appeal by an agency or entity specifically given a consultation role by the relevant portion of a project license.¹²

9. In this instance, we rejected a proposed exemption amendment. Had we accepted the amendment, it might have constituted a material change in the plan of proposed project development such that public notice and an opportunity to intervene would have been proper. Because we rejected the application, the issue of whether we should provide notice and allow interventions as to the merits never arose. Under the circumstances in this case, the only entities from whom a request for rehearing with respect to a rejection might be proper would be the applicant (who in this case did not seek rehearing) or, possibly, an entity that would have benefited from the proposed action, such as someone who would have purchased the additional power contemplated by the amendment, or who alleged that the action in question would have had environmental or other benefits to them which now were being precluded.

10. Alternative L&H does not fit into either category. Its alleged interest here is that if we had accepted the amendment application, it could then have raised for a second time its argument that Indian River obtained its exemption fraudulently. In other words, it is attempting to force us to accept a pleading so that it can continue before us its battle against Indian River's exemption. This effort to resurrect a closed case does not give rise to the opportunity to intervene. Moreover, Alternative L&H is not aggrieved by the rejection of the application, which is a matter between the Commission and Indian River alone.

11. Based on the foregoing, we deny Alternative L&H's motion to intervene and dismiss its request for rehearing. For clarity, however, we address the issues raised by Alternative L&H.

12. In the exemption proceeding, Alternative L&H sought to characterize certain filings by Indian River as a "material amendment" to its exemption application; that is, to change the proposed project from 700 kW to approximately 1,600 kW. Had we so found, Indian River's exemption application would have been assigned a new filing date beyond the July 29, 2003, deadline for filing development applications in competition with

¹² See *Pacific Gas and Electric Company*, 115 FERC ¶ 61,070 at P 6 (2006), citing *Kings River Conservation District*, 36 FERC ¶ 61,365 at 61,883 (1986). The policy is equally applicable to exemptions.

Alternative L&H's permit application, and Alternative L&H's permit application would have been reinstated.¹³ However, we rejected Alternative L&H's arguments.¹⁴

13. Alternative L&H contends that reinstating Indian River's amendment application would result in there being a "material amendment" to Indian River's exemption application. According to Alternative L&H, this in turn would mean that Indian River had untimely filed in competition with Alternative L&H's permit application, and thus, Alternative L&H's permit application would be reinstated.¹⁵ Alternative L&H errs.

14. Rescission of the rejection of the amendment application would not cause Alternative L&H's permit application to be reinstated. As discussed above, we have completed action on all aspects of the exemption orders, including the dismissal with prejudice of Alternative L&H's permit application. The regulation requiring an application filing date to be changed when the application is materially amended applies on its face only to an amendment to a pending application. Because Indian River's exemption application had been granted and we had denied rehearing at the time of the amendment application, there was no "pending" exemption application to which a new filing date could be assigned.

15. Alternative L&H urges us to investigate the issue of whether Indian River obtained its exemption as a result of material misrepresentations regarding its intentions as to the size of the project, which could result in revocation of the exemption,¹⁶

¹³ See 18 C.F.R. § 4.35(a) and (b)(2) (2006) and discussion at 115 FERC ¶ 61,321 at P 7.

¹⁴ 115 FERC ¶ 61,321 at P 7-10.

¹⁵ See rehearing request at 6-7, 8-9.

¹⁶ All exemptions for small hydropower projects are subject to various standard terms and conditions set forth at 18 C.F.R. § 4.106 (2006). Standard article 7 states that the Commission "may revoke this exemption if, in the application process, material discrepancies, inaccuracies, or falsehoods were made by or on behalf of the applicant."

We note that reinstatement of the amendment application is irrelevant to invocation of this reserved authority. We may investigate the circumstances of the application process and, if necessary, invoke Article 7, any time during which an exemption is in effect. Whether or not this matter warrants an investigation, however, we expect parties appearing before us to be forthright. Here, if Indian River knew that it intended to seek to increase the size of the project at the time that we were considering on

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seemingly under the impression that revocation of the exemption would revive its permit application. We have granted the exemption, dismissed Alternative L&H permit application, and denied rehearing of these matters. In this order, we grant Indian River's request to withdraw the amendment application. The exemption orders are now before the court of appeals, and we are required to take no further action at this time.¹⁷

16. Alternative L&H also raises issues regarding the authority of Commission staff to act in this matter. First, it argues that the Commission's regulations require the Secretary to issue public notice of and establish a comment period on the amendment application.¹⁸ In this regard, it notes that the Secretary has delegated authority to issue notice of applications filed under the Federal Power Act (FPA)¹⁹ fixing the time for filing comments, protests, or motions to intervene (acceptance notices),²⁰ and that the regulations implementing the hydroelectric provisions of the FPA state that an application will be accepted for filing if the Secretary "receives all of the information and documents" required with respect to applications for, among others, an amendment to an exemption.²¹ Because Commission staff rejected the application, however, there was no need for the Secretary to act.

17. Alternative L&H also charges that neither the Director of OEP nor his delegate has delegated authority to reject an exemption amendment application until it has been determined that the application is uncontested, and that such a determination may only be made after issuance of a public notice soliciting comments, protests, and interventions.²²

rehearing an allegation that that was the case, it should have so informed us, rather than letting us proceed on the assumption that the allegation was unfounded.

¹⁷ Rehearing request at 7-8. Whether we chose to investigate this issue is a matter of our prosecutorial discretion. Moreover, to the extent that Alternative L&H wishes to bring the matter to our attention (although this is unnecessary, since Commission staff clearly referenced it in the rejection letter), it has done so through its pleadings. One need not be an intervenor to raise compliance issues with the Commission.

¹⁸ Rehearing request at 4-5.

¹⁹ 16 U.S.C. 791a-825r, as amended (2000).

²⁰ See 18 C.F.R. § 375.302(o) (2006).

²¹ 18 C.F.R. § 4.32(f)(2006).

²² Rehearing request at 5.

18. This is incorrect. The Director is authorized generally to take “appropriate action” on uncontested amendment applications.²³ At the time that the rejection order was issued, the application was uncontested. Thus, it was entirely appropriate for OEP to reject it. Moreover, we conclude that the public interest is served by our acceptance of Indian River’s withdrawal of the amendment application, effective 15 days after it was filed. Alternative L&H’s protest to the withdrawal is based on essentially the same misunderstandings regarding potential benefits to itself discussed above.²⁴ In addition, our doing so will clarify that the exempted project is to be constructed as authorized, thereby adding, albeit modestly so, to the region’s supply of renewable, environmentally-benign electric generation.

The Commission orders:

(A) The motion to intervene filed by Alternative Hydro Associates on August 8, 2006 is denied.

(B) The request for rehearing filed by Alternative Light & Hydro Associates on August 8, 2006, is dismissed.

(C) The request of Indian River Power Supply, LLC, filed on August 4, 2006, to withdraw the exemption amendment application filed on June 22, 2006 is granted, effective July 7, 2006.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²³ 18 C.F.R. § 375.308(b)(1) (2006).

²⁴ Alternative L&H also states that because of the July 6 order rejecting Indian River’s application, there is no amendment application to be withdrawn. Protest at 3. However, Alternative L&H’s own request for rehearing raised a question as to the finality of the order, and so Indian River’s withdrawal request was appropriate.